



FOIA Officer
Environmental Protection Agency
National Headquarters
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**Re: FOIA REQUEST – Fee waiver requested for records relating to Clean Air
Science Advisory Committee (CASAC) member selection process**

Dear FOIA Officer:

On behalf of the Small Business and Entrepreneurship Council's (SBE Council's) Center for Regulatory Solutions, I respectfully ask you to consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et seq., and the regulations thereunder. SBE Council's Center for Regulatory Solutions (hereinafter "requestor") seeks public records in order to provide transparency and disseminate information to the public regarding environmental policy decisions involving the Clean Air Science Advisory Committee (CASAC). SBE Council is a non-profit, nonpartisan advocacy, research and education organization under section 501(c)(4) of the tax code, with research, legal, investigative journalism and publication functions.

Relevant Background:

The Environmental Protection Agency (EPA) is charged with reviewing and updating the National Ambient Air Quality Standards (NAAQS) for ozone at least every five years to determine if existing standards are requisite to protect human health and welfare.¹ The Clean Air

¹ Clean Water Act § 108-109, 42 U.S.C 7408-7409 (1972).

Science Advisory Committee (CASAC), an independent scientific review committee comprised of experts appointed by the EPA Administrator, is charged with, among other things, reviewing the technical and scientific bases of EPA's NAAQS and making recommendations to the Administrator "regarding new standards and revisions of existing criteria and standards as may be appropriate." While not binding, CASAC's recommendations carry significant weight and inform the Administrator's ultimate judgement. Given CASAC's pivotal role in establishing NAAQS, the panel's recommendations have a very significant economic impact on the American public. The most recent revision to ozone standards has been described as the most expensive regulation in history², and even EPA projects their new standard will cost "\$15 billion annually starting in 2025."³

Because CASAC has such an important role in setting NAAQS, Congress determined that it should be subject to enhanced transparency requirements under the Federal Advisory Committee Act (FACA).⁴ As required by FACA, CASAC's membership must be balanced: at least one member must be a physician; another must be a member of the National Academy of Sciences (NAS); and another must represent state pollution control agencies.⁵ EPA selects new members to serve on CASAC on an annual basis and the agency recently concluded its annual selection process in October 2015. While EPA did provide the public an opportunity to comment on the "short list" of candidates considered for CASAC, these comments are not available to the public.⁶ Moreover, the EPA Administrator's final decision on CASAC selection was not publically noticed. Indeed, few realized that EPA had even made new CASAC membership decisions.⁷ Visibility into EPA's selection process is especially important in light of questions that have been raised about the balance of recent CASAC panels.⁸ Indeed, the current panel does

² Ethan Barton, *Proposed ozone regulations may cost triple environmental agency projections*, Washington Examiner, March 11, 2015, <http://www.washingtonexaminer.com/proposed-ozone-regulations-may-cost-triple-environmental-agency-projections/article/2561335>.

³ *Id.*

⁴ United States Government Accountability Office, *EPA's Science Advisory Board: Improved Procedures Needed to Process Congressional Requests for Scientific Advice*, at 6 (2015), <http://www.gao.gov/assets/680/670647.pdf>.

⁵ United States Environmental Protection Agency, *Charter: Clean Air Scientific Advisory Committee*, ¶ 11 (2015), <http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/currentcharter?OpenDocument>.

⁶ E-mail from Aaron Yeow, M.P.H., Designated Federal Officer, EPA SAB to Kristina Moore (Oct. 29, 2015).

⁷ Letter from James Inhofe, Chairman, Senate EPW Committee to Gina McCarthy, Admin, U.S. EPA (Feb. 2, 2016).

⁸ The Honorable David Vitter and Jim Inhofe, *Letter to The Honorable Arthur A. Elkins, Jr., Inspector General, U.S. Environmental Protection Agency*, ¶ 1 (2014), <https://votesmart.org/public-statement/848866/letter-to-arthur-elkins->

not include a member of the NAS and the state representative is from the Northeast States for Coordinated Air Use Management (NESCAUM), which actively lobbies for stricter ozone standards.⁹

In addition to the lack of transparency surrounding the Administrator's CASAC selection process, there are also concerns about the composition of the ozone review panel (ORP). Much of the work CASAC is charged to perform is first undertaken by review panels, comprised of consultants selected by the Science Advisory Board (SAB). U.S. Environmental Protection Agency Office of Inspector General Report No. 13-P-0487¹⁰ "EPA Can Better Document Resolution of Ethics and Partiality Concerns in Managing Clean Air Federal Advisory Committees. September 2013. Pg. 3, (stating that "The EPA augments CASAC with Panels of expert consultants to help review the six pollutants. The review panels we examined generally include 16 consultants plus the seven CASAC members). This subpanel generally consists of 23 individuals, including CASAC members and consultants. As to issues of transparency in this context, EPA asserts that they apply FACA principles to the ORP.¹¹ (United States Government Accountability Office Report to Congressional Requesters regarding EPA's Science Advisory Board Improved Procedures Needed to Process Congressional Requests for Scientific Advice. June 2015. Pg. 6, *citing* "As federal advisory committees, the SAB and CASAC are subject to FACA, which broadly requires balance, independence, and transparency).¹² In fact, EPA's assertion rings hollow, as the public does not have any visibility into this selection process.

Request for Records:

inspector-general-environmental-protection-agency-oig-report-neglects-to-address-cronyism-with-clean-air-advisors#.VqokmPkrKCi.

⁹ United States Environmental Protection Agency, Members of the Clean Air Scientific Advisory Committee, ¶ 1 (2016), <http://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalCommitteeRosters?OpenView&committee=CASAC&secondname=Clean%20Air%20Scientific%20Advisory%20Committee%20>.

¹⁰ United States Environmental Protection Agency, *EPA can Better Document Resolution of Ethics and Partiality Concerns in Managing Clean Air Federal Advisory Committees*, Report No. 13-P-0387, at 3 (2013), <http://www.epa.gov/sites/production/files/2015-09/documents/20130911-13-p-0387.pdf>.

¹¹ United States Environmental Protection Agency, *About the Federal Advisory Committee Act (FACA) at EPA*, ¶ 1 (2016), <http://www.epa.gov/faca/about-federal-advisory-committee-act-faca-epa>.

¹² United States Government Accountability Office, *EPA's Science Advisory Board: Improved Procedures Needed to Process Congressional Requests for Scientific Advice*, at 6 (2015), <http://www.gao.gov/assets/680/670647.pdf>.

Given the current lack of transparency surrounding EPA's selection process to determine both the CASAC Board as well as the Ozone Review panel, SBE Council's Center for Regulatory Solutions seeks the following records:

1. All documents referring or relating to the 2015 CASAC selection process, which includes, but is not limited to the following categories of documents:

- a. All comments submitted to EPA pursuant to its April 2, 2015 request for nominations to CASAC.
- b. All communications referring or relating to the CASAC selection process between EPA's SAB and
 - i. The Office of the Administrator,
 - ii. The Office of Air and Radiation EPA,
 - iii. The Office of General Counsel.
- c. All communications between each candidate for CASAC membership and
 - i. The Office of the Administrator,
 - ii. The Office of Air and Radiation,
 - iii. The EPA's SAB staff.
- d. All communications referring or relating to Administrator McCarthy's final CASAC selection between and among any of the following offices: EPA's Office of the Administrator, Office of the Air and Radiation, and/ or the Office of General Counsel.
- e. All press releases or public announcements and notifications related to the CASAC selection process.

2. All documents referring or relating to the upcoming Ozone Review Panel selection, which includes, but is not limited to the following categories of documents:

- a. Correspondence between any candidate for the ORP and the SAB.
- b. Discussion between an EPA employee and an outside party relating to ORP panel membership.
- c. All communications referring or relating to the ORP between EPA's SAB and
 - i. The Office of the Administrator,
 - ii. The Office of Air and Radiation EPA,

- iii. The Office of General Counsel.
- d. All communications between each candidate for the ORP and
 - i. The Office of the Administrator,
 - ii. The office of Air and radiation,
 - iii. The EPA's SAB staff.

The responsive records will be dated from January 1, 2015 to the present. We agree to pay up to \$150.00 for responsive records in the event EPA denies our fee waiver request.

Demonstrated relevance and public interest in responsive records:

The Center for Regulatory Solutions is a project of the Small Business and Entrepreneurship Council, a 501(c)(4) advocacy, research, and education organization dedicated to protecting small business and promoting entrepreneurship. For twenty-three years, requestor has worked to educate elected officials, policymakers, business leaders and the public about policies that enable business start-up and growth.

Our interest in the documents relates to our ongoing efforts to educate the public, scholars, and state and local officials on matters pertaining to ozone standards. The general public and public policy community will benefit from the dissemination of the information requested since our staff and research experts are widely published on these subjects and have produced multiple reports on ozone standards including state reports for Colorado¹³, Ohio¹⁴, and Pennsylvania¹⁵. Requestor publishes about these and other issues in print and electronic media, producing blogs, reports, and factsheets for distribution to legislators, journalists, and other interested parties.

The information sought by requestor will be used to better the public's understanding of how the federal government, and specifically EPA, makes decisions under the Clean Air Act.

¹³ Center for Regulatory Solutions, *Slamming the Brakes: How Washington's Ozone Plan Will Hurt the Colorado Economy and Make Traffic Worse*, ¶ 1 (2015), <http://centerforregulatorysolutions.org/new-report-details-economic-impact-of-epas-ozone-proposal-on-colorado/>.

¹⁴ Center for Regulatory Solutions, *Powering Down: How Washington's Ozone Plan Will Snuff Out Ohio's Economic Recover*, ¶ 1 (2015), <http://centerforregulatorysolutions.org/wp-content/uploads/2015/08/CRS-Powering-Down-Ohio-Report.pdf>.

¹⁵ Center for Regulatory Solutions, *Moving the Goal Posts: How Washington's Ozone Plan Threatens Working Families and Pennsylvania's Economic Comeback*, ¶ 1 (2015), <http://centerforregulatorysolutions.org/wp-content/uploads/2015/09/CRS-Moving-The-Goal-Posts-PA-Report.pdf>.

Specifically, this request must be fulfilled because CASAC plays a critical role in determining ozone standards, which EPA is required to review at least every 5 years, and the public knows very little about the individuals who serve on the committee and their qualifications for such an important responsibility.

Requestor will use the responsive records to continue their proven track record of informing the public by disseminating information on the following topics: (1) the controlling factors that informed EPA's selection process; (2) the diversity of viewpoints among those considered; and (3) how the agency dealt with possible conflicts of interest, or known bias.

Authority:

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "general philosophy of full agency disclosure" that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.*

In response to this request, FOIA requires EPA to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

Fee Waiver:

Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “toll gates” on the public access road to information.” *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. The legislative history of the fee waiver provision reveals that it was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,” in particular those from journalists, scholars and nonprofit public interest groups like requestor. *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).

A fee waiver requires the requestor to satisfy a two-prong test: (1) proving first how the disclosure is in the public interest and will contribute significantly to the public understanding of the operations or activities of government; (2) and second how disclosure is not primarily in the requestor's commercial interest. Courts have pointed to FOIA's legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

As such, and for the following reasons, requestor seeks waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester”); *see also* 29 CFR §70.40(c)(2) (“When an educational or non-commercial scientific institution makes a request, only reproduction costs will be assessed, excluding charges for the first 100 pages”).

To the first prong, requestor satisfies this factor as a de jure news media outlet. *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Requestor has a record of obtaining and producing information as would a news media outlet and as a policy organization that broadly disseminates information on important regulatory issues. With regard to ozone,

requestor has a microsite dedicated to the issue, which has published extensive content, and original research, on EPA's proposed ozone standard. Requestor also has ongoing publication efforts related to their environmental and economic policies. Accordingly, requestor is functionally a news outlet and has disseminated its work in a manner that results in coverage by national news outlets on television, in national newspapers, and in local outlets throughout the United States. Professionals affiliated with SBE Council's Center for Regulatory Solutions have been cited by multiple reputable news outlets including the Wall Street Journal¹⁶, The New York Times¹⁷, E&E News¹⁸, The Hill¹⁹, Reuters²⁰, National Journal²¹, Washington Times²² and Fox News²³. Professionals affiliated with SBE Council's Center for Regulatory Solutions have also testified before the United States Senate Environment and Public Works Committee²⁴ and the United States House Committee on Science, Space and Technology²⁵ on their work related to the Administration's enforcement of the Clean Air Act and EPA regulatory overreach. The information received from EPA will be publicly disseminated through the Center for Regulatory Solution's website via Fact Sheets, Reports, Blogs, and via Facebook and Twitter.

Requestor maintains that as a nonprofit organization and educational institution, the public will greatly benefit from our efforts to disclose and disseminate the responsive records. Congress enacted FOIA clearly intending that "fees should not be used for the purpose of

¹⁶ Amy Harder, *EPA Sets Stricter Standard for Ozone*, Wall Street Journal, October 1, 2015, <http://www.wsj.com/articles/epa-to-set-stricter-air-pollution-standard-for-ozone-1443715727>.

¹⁷ Coral Davenport, *New Limit for Smog-Causing Emissions Isn't as Strict as many Had Expected*, N.Y. Times, October 1, 2015, http://www.nytimes.com/2015/10/02/us/politics/epa-to-unveil-new-limit-for-smog-causing-ozone-emissions.html?_r=1.

¹⁸ Ariel Wittenberg, *Ozone rule foes combat favorable poll with one of their own*, E&E News Greenwire, September 17, 2015, <http://www.eenews.net/greenwire/stories/1060024881/search?keyword=ozone>.

¹⁹ Timothy Cama, *Massive biz blitz aims to torpedo ozone rule*, The Hill, September 10, 2015, <http://thehill.com/policy/energy-environment/253170-massive-biz-blitz-aims-to-torpedo-ozone-rule>.

²⁰ Valerie Volcovici, *Industry in final ad blitz against new U.S. smog rule*, Reuters, September 1, 2015, <http://news.yahoo.com/industry-final-ad-blitz-against-u-smog-rule-134429887--sector.html>.

²¹ Jason Plautz, *In Smog Rule Fight, Industry Groups Make their Push in Purple States*, National Journal, August 27, 2015, <http://www.nationaljournal.com/energy/2015/08/27/smog-rule-fight-industry-groups-make-their-push-purple-states>.

²² Ben Wolfgang, *Obama climate change plan to kill jobs, raise electric bills; could pose health risk*, Washington Times, August 2, 2015, <http://www.washingtontimes.com/news/2015/aug/2/obama-climate-change-plan-to-eliminate-jobs-raise-/?page=all>.

²³ George Russell, *EPA distorts health benefits of mega-costly clean-air rule*, Fox News, July 16, 2015, <http://www.foxnews.com/politics/2015/07/16/epa-distorts-health-benefits-mega-costly-clean-air-rule.html>.

²⁴ Center for Regulatory Solutions, *Statement by Karen Kerrigan on behalf of the Center for Regulatory Solutions to the Senate Committee on Environment and Public Works Review of the President's Climate Action Plan*, ¶ 1 (2014), http://centerforregulatoryolutions.org/wp-content/uploads/2014/01/Senate-EPW-Statement_1-16-14.pdf.

²⁵ Karen Kerrigan, *EPA Regulatory Overreach: Impacts on American Competitiveness*, ¶ 1 (2015), <http://sbecouncil.org/2015/06/04/statement-for-the-record-on-epa-regulatory-overreach-house-committee-on-science-space-and-technology>.

discouraging requests for information or as obstacles to disclosure of requested information.” *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Id.* The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* “This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy)).

In this request now pending before the agency, the subject matter of the requested records specifically concerns identifiable operations of government (e.g. the selection of CASAC panel members) and the discovery of said requested records pertain to activities of great public and congressional interest (e.g. U.S. Senate Environment and Public Works Committee investigations into the EPA’s proposed and final ozone standard, Chairman Senator James Inhofe’s (R-OK) investigation into to the final ozone standards and reports issued by the EPA Inspector General).

As courts have also recognized, public interest groups employ FOIA for activities that are essential to the performance of certain of their primary institutional activities (i.e. publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged). These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of our organization. Access to information through FOIA is vital to our organizational missions. *Better Government Ass’n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986).

To the second prong of the fee waiver test, information sought in this request is not sought for a commercial purpose. Requestor is organized and recognized by the Internal Revenue Service as 501(c)(4) social welfare and educational organization. We do not charge for copies of reports and information provided to us cannot result in any form of commercial gain. As non-

commercial requesters, we are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. 2010). Specifically, the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

Conclusion:

We emphasize that a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003).

As such, requestors have stated “with reasonable specificity that its request pertains to “operations of the government,” and “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006). We request EPA err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes.

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. §552(b).

If you deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption on which you are relying, and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Kerrigan". The signature is fluid and cursive, with the first name "Karen" and last name "Kerrigan" clearly distinguishable.

Karen Kerrigan
President & CEO

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